

Written Statement of Proposed Testimony

“Toxic Marketing Claims and their Dangers”

Hearing Before

Committee on Commerce, Science, and Transportation

Subcommittee on Consumer Protection, Products Safety, and Data Security

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Introduction

I would like to thank Subcommittee Chairman Blumenthal, Ranking Member Blackburn, and the members of the Subcommittee for inviting me to testify at this hearing on Toxic Marketing Claims and their Dangers. I commend you for examining these issues that affect American consumers and the interests of U.S. businesses. It is my hope that I can offer some helpful perspective, as former Acting Chairman and Commissioner of the Federal Trade Commission and a longtime consumer protection practitioner, that will assist the Committee with this important effort.

The FTC is a highly productive, independent agency with a broad mission to both protect consumers and maintain competition in most sectors of the economy. In fulfilling its consumer protection mission, the agency enforces laws that prohibit business practices that are unfair or deceptive to consumers, being mindful not to impede legitimate business activity. Deceptive practices are defined in the Commission's Policy Statement on Deception¹ as involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. An act or practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."² The Subcommittee may find it interesting that the FTC's Unfairness Policy statement was developed in a proceeding involving a product, tractors, that could be dangerous if operated without certain precautions.³

¹ FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (1983), appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

² 15 U.S.C. § 45(n).

³ FED. TRADE COMM'N., COMMISSION STATEMENT OF POLICY ON THE SCOPE OF THE CONSUMER UNFAIRNESS JURISDICTION (1980) appended to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>. In the case, the Commission found

As part of its authority to stop deceptive and unfair practices, the Commission oversees national advertising of a wide variety of products in a wide variety of formats, including online, television, print, and radio advertising, as well as a product's labeling and packaging, point of sale displays, and statements in brochures. The FTC's general rules relating to advertising are straightforward: first, marketers must not mislead consumers; and second, claims made about certain product attributes must be substantiated before they are made. In addition, marketers must avoid advertising or marketing that causes substantial injury that a consumer cannot avoid, such as by following clear and prominent warnings and disclosures.

It may be useful to expand on some of the concepts that underlie these general requirements. With respect to the FTC's Deception Analysis, there are several principles to keep in mind. First, the Commission reviews advertising from the perspective of a reasonable consumer in the target group. For example, for advertising to children, the FTC will review the advertisement from the perspective of a reasonable child. Second, the Commission is concerned about both express and implied claims made in advertising – including claims that relate to the safety characteristics of products. Third, the deceptive interpretation of the ad does not have to be the only interpretation for the ad to be found deceptive. Some advertising may be interpreted in a variety of ways. If a deceptive interpretation is a reasonable one, the company may be held liable. Finally, an advertiser can deceive a consumer by what it doesn't say as well as what it does say. If they omit information from advertising and marketing that is material in light of the representations made in the ad, then it is deceptive.

I will turn now to the FTC Advertising Substantiation Policy. Under this doctrine, every objective product claim, whether express or implied, must be supported by evidence providing a

that the defendant's failure to disclose to customers the risk of fuel geysering in tractors was unfair under Section 5 of the FTC Act and required the defendant to provide prominent notice to tractor purchasers about these risks.

reasonable basis for the claim. If an entity makes a safety claim in its advertising, that safety claim must be supported.

The amount and type of evidence required to support a reasonable basis claim depends on a number of factors, including what experts in the relevant scientific or technical field believe is reasonable. For some claims – for example, representations about the health benefits of a particular product – an advertiser may be required to possess clinical testing or other scientific evidence that substantiates the claim. To qualify as a reasonable basis, the tests or studies relied upon to support the claims must have been conducted and evaluated in an objective manner. In addition, the tests must have been done by qualified persons, using procedures generally accepted in the scientific community as giving accurate and reliable results.

I will next turn to the FTC's Unfairness jurisdiction. As noted above, an unfair act or practice is one that causes substantial consumer injury that is not reasonably avoidable and is not outweighed by any countervailing benefits to consumers or competition. With respect to unfair advertising, the classic example was the promotion of razor blades by placing the products themselves in the comics section of the Sunday paper. The Commission alleged that this practice created a substantial and unjustified risk of injury to children. Certain products may be safe or legal for adults, but not children, and the FTC has used its unfairness authority to bring enforcement actions where such products are marketed to children.

This brings me to the topic of today's hearing, which is dangerous marketing claims. I would like to provide a few examples over the years in which the FTC has used its deception and unfairness authority to bring cases where safety was featured prominently in the product's advertising. In one case, the Commission issued a complaint charging manufacturers of add-on braking devices with making deceptive safety claims for their products. Specifically, the

Commission alleged that the companies claimed, falsely, that their products were equivalent to, and offered the same safety benefits as, anti-lock braking systems – commonly known as “ABS” – that are factory installed equipment on many cars.⁴ In reality, these add-on aftermarket devices were substantially different in design and operation from true ABS equipment, and do not provide the same safety benefits. The Commission eventually reached a settlement with the defendants that bars them from making false or unsubstantiated claims about any aftermarket braking product and requires that they have substantiation for any claims for braking devices. The settlement also required the defendant to serve its distributors with a summary of the order and to take reasonable steps to ensure they comply with the order.

Because cases that involve deceptive safety or health claims clearly have the greatest potential for serious consumer injury, the FTC will often impose specially crafted remedies in them. For example, the FTC has required companies to send consumers who have purchased the product a safety notice to alert the consumer of the Commission action and to correct any misimpression about claimed safety benefits. It has also required companies to modify trade names where the name clearly communicates a safety claim, and disclosure alone cannot cure that impression. For example, in the add-on brake case mentioned above, the companies use the initials “ABS” as part of their product name and the FTC sought to prohibit this use and required companies to include corrective disclosures in future advertising and packaging materials.

Of course, the FTC is not the only government agency concerned about truthful claims and the Commission routinely cooperates with other federal agencies, as well as state and local enforcement officials. This is particularly true in cases that involve health or safety claims, where the FTC will rely on the expertise of such agencies as the CPSC, the EPA, and the FDA to

⁴ Press Release, FTC, Aftermarket Brake Marketer Settles FTC Charges (July 23, 2003), <https://www.ftc.gov/news-events/press-releases/2003/07/aftermarket-brake-marketer-settles-ftc-charges>.

help it analyze the validity of the underlying claim. Indeed, many of the FTC cases are initiated by referrals from other agencies.

I would like to finish with a discussion of two FTC actions in which I was personally involved, and which bracketed my tenure as a Commissioner, from 2012 to 2018.

In August 2012, the Commission announced a settlement with the marketers of the Brain-Pad mouth guard.⁵ The Commission's complaint alleged that Brain-Pad, Inc. lacked a reasonable basis for their claims that Brain-Pad mouth guards reduced the risk of concussions, especially those caused by lower jaw impacts, and that they had falsely claimed that scientific studies proved that those mouth guards did so. The final Order in that case prohibited the Respondents from representing that any mouth guard or other equipment used in athletic activities to protect the brain will reduce the risk of concussions, unless that claim is true and substantiated by competent and reliable scientific evidence. The Order also prohibited them from misrepresenting the results of any tests or studies on such products, and from misrepresenting the health benefits of such products. As the Director of the FTC's Bureau of Consumer Protection noted when the settlement was announced, "Mouthguards can help to shield a person's teeth from being injured, and some can reduce impact to the lower jaw. But it's a big leap to say these devices can also reduce the risk of concussions. The scientific evidence to make that claim just isn't adequate." When the Brain-Pad Order became final in November 2012, Commission staff sent out warning letters to nearly 20 other manufacturers of sports equipment, advising them of the Brain-Pad settlement and warning them that they might be making deceptive concussion protection claims for their products. FTC staff then monitored the

⁵ Press Release, FTC, Settlement with FTC Prohibits Marketer Brain-Pad, Inc. from Claiming that Its Mouthguards Can Reduce Risk of Concussions (Aug. 16, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/settlement-ftc-prohibits-marketer-brain-pad-inc-claiming-its>.

websites of these manufacturers, working with them as necessary to modify the claims on their sites and, in some cases, ensure that necessary disclosures were clear and prominent.

The second matter I would like to discuss involved the marketing of nicotine products. The FTC's law enforcement activities involving tobacco advertising and promotion date back to the 1930s, and the agency has played an important role in the adoption of requirements for warning labels on tobacco products. The Commission also publishes periodic reports on advertising and promotion activities in the cigarette and smokeless tobacco industries, which provide information on sales and on expenditures for various categories of marketing expenditures. The FTC recently announced that it would begin collecting such information for e-cigarettes.⁶

As with other products, the Commission's primary role for tobacco-related products is to ensure that products are marketed in a manner that is truthful, not misleading, and adequately substantiated. The Commission does not pre-screen advertising claims for tobacco-related products or any other product. Instead, the agency addresses deception in the marketing of tobacco-related products largely through post-market law enforcement actions targeted against specific false or misleading claims or unfair practices, just as it does for other products.

Near the end of my tenure as Acting Chairman, in May 2018, the FTC, jointly with the U.S. Food and Drug Administration (FDA) issued warning letters to manufacturers, distributors, and retailers for selling e-liquids used in e-cigarettes with labeling and/or advertising that resemble kid-friendly food products, such as juice boxes, candies, or cookies, some of them with

⁶ FTC, Statement of the Federal Trade Commission Concerning Cigarette and Smokeless Tobacco 6(b) Orders (Feb. 25, 2019), https://www.ftc.gov/system/files/documents/public_statements/1462887/e-cigarette_commission_statement_2-25-19.pdf.

cartoon-like imagery.⁷ Several of the companies receiving warning letters also were cited for illegally selling the products to minors.

Some examples of the products outlined in the warning letters, and being sold through multiple online retailers, include: “One Mad Hit Juice Box,” which resembles children’s apple juice boxes, such as Tree Top-brand juice boxes; “Vape Heads Sour Smurf Sauce,” which resembles War Heads candy; and “V’Nilla Cookies & Milk,” which resembles Nilla Wafer and Golden Oreo cookies. Other products include “Whip’d Strawberry,” which resembles Reddi-wip dairy whipped topping, and “Twirly Pop,” which not only resembles a Unicorn Pop lollipop but is shipped with one.

Given the serious risk of child poisonings due to ingestion of liquid nicotine, we stated that marketing these products in packaging that is likely to be particularly appealing to young children could present an unwarranted risk to health or safety and could thus be an unfair advertising practice under the FTC Act.

Conclusion

Thank you for the opportunity to discuss how my former agency, the FTC, has long used its authority over unfair and deceptive acts and practices to challenge deceptive and unfair marketing claims that raise health and safety risks. I look forward to your questions.

⁷ Press Release, FTC, FTC, FDA Take Action Against Companies Marketing E-liquids That Resemble Children’s Juice Boxes, Candies, and Cookies (May 1, 2018), <https://www.ftc.gov/news-events/press-releases/2018/05/ftc-fda-take-action-against-companies-marketing-e-liquids>.